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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-372

HERBERT HARVEY,

Petitioner,

—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND APPENDIX

HERBERT HARVEY, *pro se,*
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No. .....

HERBERT HARVEY,

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—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the affirmance without Opinion by United States Court of Appeals for the Third Circuit and the Final Judgment of United States District Court for the District of New Jersey in the matter of *Theodorus Bron, et al.* v. *Herbert Harvey, et al.*

Petitioner is Herbert Harvey appearing *pro se.* Respondents are Emile W. Saulnier and Jeanette G. Saulnier, his wife, Joseph Francis Moran and Eleanor Moran, his wife, Francis J. Straulina and Virginia D. Straulina, his wife. Respondents are plaintiffs in the said action. Petitioner is a defendant in the District Court and an appellant in the Court of Appeals.

Opinions Below

The Opinions in the District Court below are unreported and are appended. The Opinion cited therein, of the Supreme Court of New Jersey in the matter of *Bron* v. *Weintraub*, reported at 42 N.J. 87, 199 A 2d 625 is also appended. The affirmance of the District Court judgment by the Court of Appeals was without Opinion. Its affirmance is appended, as is its denial of a Motion for rehearing.

Jurisdictional Statement

Review is sought of the judgment of the United States Court of Appeals for the Third Circuit entered April 30, 1973 (Appendix, page 30a) affirming without opinion the judgment of the District Court in the matter of *Bron et al.* v. *Harvey et al.*, bearing docket number 72-1480 in the Circuit Court. Petition for rehearing was denied under date of May 31, 1973 (*ibid.*, page 32a).

In the absence of an opinion, the affirmance is in effect the judgment of the District Court which it affirms. The judgment in question was entered in District Court in the same matter, *Bron et al.* v. *Harvey et al.* under docket number 482-69 in that court. A stay was issued there on a Motion under Rule 52 (b).

Jurisdiction of this court is conferred in the opinion of petitioner by 28 U.S.C. §1254(1) providing that judgments of the United States Court of Appeals, as well as judgments of the United States District Courts, may be reviewed on certiorari. As to the District Court judgment

referred to, it may be embraced in this petition if the court determines the time for appeal of that judgment to have tolled while the matter was before the Court of Appeals.*

The jurisdiction of the District Court arose as set forth in this Petition, page 6.

The Question Presented

Where an individual, by judgment of a state court entered with no vestige of due process and so void, is purportedly divested of an estate in real property, and a federal court in a subsequent suit decrees the same divestment, without trial on the merits, solely on the basis of the state court proceeding, has due process of law been observed?

Constitutional Provisions

Amendment V No person shall be . . . deprived of life, liberty, or property, without due process of law.

Amendment XIV No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Note—The actions of the federal courts below are considered by petitioner to come under Amendment V; but the state court action upon which they were based is also involved and comes under Amendment XIV. Since both may arise, both are cited.

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* The distinction here made between a) reviewing the judgment of the Court of Appeals and b) reviewing the judgments of both courts below is purely formal, inasmuch as the judgments are in effect the same. Either way, the present petition applies.

Statement of the Case

In 1933 Harry Weintraub died seized of the lands of this proceeding.* In 1959 his heirs conveyed to Hudson Trading Corporation, a dealer in encumbered land titles. Petitioner was at the time secretary of Hudson Trading Corporation and the individual who negotiated the transfer of title.

It developed that part of the land was improved by three dwellings occupied by the respondents herein. They believed they owned them, having had them by deed from a speculative builder under GI financing. The error in title had been made by a title company employed, or at least paid, by the veterans, before they occupied the dwellings.

I wrote the occupants, mentioning the title situation and suggested they secure representation to settle the matter. They, however, went back to the title company for counsel. In the upshot, Hudson commenced an action for possession against the three veterans. They counterclaimed to quiet title. By that time I had resigned as an officer of Hudson. I was not a party to the proceeding nor to the counterclaim.

Hudson prevailed in the litigation—the court rendering judgment in its favor.** On appeal, the judgment was affirmed. On further appeal to the Supreme Court of New Jersey, the judgment was reversed in an Opinion holding Hudson to be a trustee *ex maleficio* for the occupants. The

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* The lands of the fifth, seventh and eighth counts of the complaint, being portions of the lands now owned and occupied by respondents.

** And giving the occupants the option, which they did not exercise, of purchasing the properties from Hudson at the appraised value of the bare land.

facts upon which the trust was constructed were recited in the Opinion, but were not in the record before the court and had not been adjudicated in the proceeding. Pursuant to the reversal, the trial court entered an amended judgment divesting Hudson.*

In the meantime a $22,500. mortgage had been made to me by Hudson covering the lands of the action.** They also came under a blanket mortgage given to me by Hudson prior to the litigation, which covered all lands owned by it or to be acquired by it.† The amount of the blanket mortgage is $2,500. It provides that to the principal sum shall be added delinquent taxes paid by the mortgagor. Such delinquent taxes have been paid.

While I have not waived any portion of the demised interest, this petition concerns in the first instance the blanket mortgage.

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* The action, *Hudson Trading Corp.* v. *Saulnier*, was consolidated in the state trial court with another action, *Bron* v. *Weintraub*, where the matter was heard on the issue of title (District Court, the Record, Exhibit DH-11, page 35a; item 7). In Supreme Court of New Jersey, on the other hand, the determination was made on an issue, there raised *de novo*, of constructive trust. In the matter of title, the cases were similar, title of all the properties having derived from Harry Weintraub. Respecting the constructive trust, the circumstances of the two cases were different. Among these differences, I note that in *Bron*, there had been pending at the time of transfer of title a foreclosure action on a tax lien. In *Saulnier* there was none. The pendency of the foreclosure was a leading factor in the construction of the trust. There were other substantial differences between the circumstances in *Bron* and the circumstances in *Saulnier*. Except that both titles originated in Harry Weintraub, the circumstances surrounding *Bron* were unique to that action. The petition here affects the lands of *Saulnier*.

** And assigned by me by mesne assignment to defendant Freda Solomon in 1966. The assignment to Freda Solomon was disallowed by the District Court.

† The chronology of these and certain other events affecting the properties appears in the Appendix, page 33a.

Although I had not been a party to the action, nor to the appeal, and though the Opinion of reversal made no reference to my interest, the amended final judgment which concluded the action named me as one of the persons who had thenceforth no interest in the property.

This was in 1964. In the succeeding years, various actions were brought in one court or another by others than myself* calling into question the trust *ex maleficio*. None of these attacks succeeded. Title of respondents was sustained under the trust holding.

The present action was instituted in 1969 in the New Jersey courts, and was removed on the motion of another defendant, under the jurisdiction conferred by 28 U.S.C. §1441 (a),** to the United States District Court for the District of New Jersey. It is the first action affecting the premises in question to which I was a party. Respondents here are among the plaintiffs. At the hearing plaintiffs introduced no evidence of wrongdoing. They stipulated to the title of my mortgagor, subject to the trust, and to the mortgage debt. They attacked my mortgages, based upon the trust *ex maleficio* imposed upon the mortgagor

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* In addition, two proceedings were initiated by me and came to nothing. (1) As assignee of Hudson in the *Bron* action I applied for certiorari to the Supreme Court of the United States, on the ground that divestment of Hudson in that matter (also by trust *ex maleficio*) was based on facts which had never been tried in a court. (2) I applied to Superior Court of New Jersey to vacate the judgment in *Hudson Trading Corporation* v. *Saulnier* on the ground that it was entered against one not a party. The Supreme Court denied certiorari; Superior Court also declined to entertain my application, dismissing it instead ex parte without notice or hearing. Neither of these proceedings resulted in determining any issue.

** On a showing of diversity of citizenship and a cause exceeding $10,000.

by the New Jersey court. I counterclaimed for a holding that the state court judgment was void as against me.

The district court held that the trust reached back to destroy the mortgage made by the constructive trustee, Hudson Trading Corporation, and rejected my contention that the judgment imposing the trust was not binding on me as one not a party to the proceedings. Judgment issued in district court, accompanied by an Opinion, divesting me of my interest. The judgment was affirmed without Opinion by the Circuit Court of Appeals. This is a petition for review of the judgment and of its affirmance.

ARGUMENT

Due process of law, a broad concept, with many outlying fringes which the courts have diligently protected, has a certain indispensable core. The area of the present litigation is an individual's interest in real property. In that area, the elements without which due process in its bare rudiments does not exist are: a) an action to which the claimant is made a party;* b) service of process;** c) a judicial determination of the facts, in which the claimant may be heard.† Lacking one of these elements, a proceeding must be held deficient in due process. Lacking all three, there is no process of law at all.

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* *Bioni* v. *Haselton*, 134 A. 606, 607 [1] (Vermont Supreme 1926); *Pryor* v. *Western Paving Co.*, 184 P. 88, 89 [1] (Okla. Supreme 1919).

** *Williams* v. *Board of Education*, 124 N.J.L. 380, 382 [2] (N. J. Supreme 1940); *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 493 (New Jersey Supreme 1952).

† *Frahn* v. *Greyling*, 195 So. 758, 761 [2]. The cases cited in the footnotes to this page furnish dicta.

In the present case, divestment of an estate in real property has taken place, absent all three of the elements in question.

My interest is that of mortgagee,[1] or as I prefer to formulate it here, a grantee with mortgage covenants.

The title of my grantor was upheld by a state court[2] and was stipulated in federal district court.[3] No evidence was introduced in district court to question the debt of the mortgages or to warrant an equitable determination against me.[4] In fact, no evidence was introduced in either state or federal court denigrating my interest.[5] After the mortgages were made, however, my grantor was divested of title, by a state court decree.[6] The divestment, though effective against my grantor, was not effective against me. I was not a party and I had not been served with process.[7]*

In the state court proceedings, the first mention of my interest was in the amended decree. That decree purported by its language to divest me of my interest.[8] Any one of the following conditions rendered it void as against me:

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[1] Superscript numbers refer to Reference Notes beginning at page 25 of this Petition. Instruments there referred to in those Notes will be among those designated by petitioner as part of The Record for transmission to this Court.

* The District Court argued that the legal effect of divesting my grantor in the state court should be to divest me, since my title could rise no higher than his. (Appendix, page 24a.) This last is true; but I am not concluded by the determination against my grantor because I was not a party[8] to the proceeding.

Attention should be given to a remark in an interim Opinion of the district court judge, incorporated by referring in his final Opinion, to the effect that Harvey was not a party to the state court proceeding in the ordinary sense, but definitely was "in a real sense". (Appendix, page 23a.) No supportive facts are set out. This already foreshadows the issue. Divesting people who are not parties in the ordinary sense, that is, named in an action and served with process, but only in a "real" sense, to be defined at the pleasure of the judge, is a way of dispensing with due process.

a) I was not a party to the action;[10] b) there had been no appeal against me of the earlier decree in favor of my grantor;[11] c) the Opinion in the appeal had not mentioned my interest (Appendix, page 1a). Actually all three of the conditions obtained.

The divestment of my grantor was accomplished in the state court by constructing upon it a trust *ex maleficio* in favor of the defendants in the state court action (Appendix, page 11a). Three of the defendants there are the respondents to the present petition. The trust was established in the appeal reversing the earlier determination of the state court in favor of my grantor (*ibid.*). As already noted, I was not a party. Nor was I named as a party in the appeal.* The holding of trust *ex maleficio* was necessarily void as to me by virtue of my absence from all the proceedings.**

We have observed that in the state proceeding there was no determination, in either the trial court or the appeals court, of any fact bearing on the trust *ex maleficio*. The circumstances were these. The issue heard in the state trial court was of title only.[13] That issue was resolved, as

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* One whose substantial interest is to be affected by an appeal is a necessary party to the appeal proceeding, whether or not he was a party to the original proceeding. Elliott on Appellate Procedure, 1892, secs. 140, 144.

** The rules of procedure in the state provide that a decree is not appealable after 45 days. Thereafter the interests vest which it determines. *In re Pfizer*, 6 N.J. 233, 239 [4], N. J. Supreme 1951; *Weaver* v. *No. Bergen Tp.*, 6 N.J. 475. Consequently, if I were held to be a party to the procedure in the state trial court, I would be of the prevailing party;[12] and failure to appeal it against me would render the judgment there entered (in 1962) *res judicata* in my favor. The contention of the district court (last footnote but one) that I was a party to the 1962 proceeding "in a real sense" would therefore be a bar to my divestment, rather than, as the district court argued, a ground for it.

noted, in favor of my grantor. The issue resolved by the state court on appeal was *de novo* of the trust *ex maleficio*. It was determined, against my grantor, on a set of operative facts not bearing on the question of title (Appendix, page 1a) and for which as a matter of fact no evidence was introduced in trial court.[14] These facts were never determined in that proceeding,* even as against those who were party to it, and certainly not as against me, who was not. The personal strictures (Appendix, page 4a) parenthetically indulged in, also without proofs, by the state court against me, being one not present in the proceeding, were little better than slanders, based on surmises. They, like the rest of the proceeding, cannot be conclusive on me.

In the state court action, then, judgment of divestment was entered against me in a proceeding in which I was not

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* The operative facts which are found in the Opinion of the Supreme Court of New Jersey (Appendix, pages 1a and following) were that Hudson had read a published notice of constructive service addressed to Harry Weintraub and his heirs. "Our rules of court called for this public notice solely to reach the holders of existing interests, but Hudson read a communication intended for another and sought to turn that information to its own gain." (Appendix, page 6a.) This is the basis of the constructive trust as the Opinion makes clear in this language: "With respect to the factual pattern before us, no one disputes the right of the holders of existing interests to convey them to third persons if they wish. What is challenged is the legality of the intrusion into the scene by third persons . . ." And again, "We are dealing with tax titles. Contrary to early hostility to such titles, the policy today is to support them" (*ibid.*, page 5a). None of the facts here involved appears in the record before the court. The transcript of the trial court hearing in that matter is an exhibit in our record (Trial Exhibit DH-11). It fails to disclose any evidence that Hudson or its officers read the published notice or that there was any action pending at or about the time of Hudson's deeds affecting the lands of this petition; or that any tax title proceeding had been taken against them.

It cannot be assumed here that, had I been before the court in that matter, the alleged facts would have been allowed to go unchallenged.[15]

a party, was not served with process, in which no fact relevant to my interest was judicially determined, and indeed where my interest was not mentioned until in the amended final judgment. The proceeding, as far as affects me, lacked all the basic elements of due process.

In the federal court proceedings I met my burden of showing an interest in the land.[16] No evidence was presented in support of plaintiffs' contention that my interest be expunged.[17] There was no trial on the merits.[18] Merely the state court judgment which, of course, is *res judicata* against those who were party to it, was held conclusive also as against me. This question is well settled. A prior judgment is *res judicata* only as against persons who were party to the proceedings and their privies. It is not *res judicata* against one not a party.* *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky,* 247 U.S. 464 (1918). For the dictum, reference is made to *Schwegman* v. *Neff,* 29 NE 2d 985, 986 [5] (Indiana Supreme 1940); *Watterson* v. *Tremaine,* 24 NYS 2d 830, 835 [6] (Supreme Court 1941); *Simmons* v. *Raudozzo,* 25 NYS 2d 270 (Appellate 1941); *Universal Construction Co.* v. *Ft. Lauderdale,* 68 So. 2d 366, 369 [4] (Fla. Supreme 1953); *Ralph Wolff & Sons* v. *New Zealand Ins. Co.,* 58 SW 2d 623, 624 [1] (Kentucky Appeals 1933). In *Williamson* v. *City of Clay Center,* 237 F. 329, 335 it was ruled that a mortgagee, not a party to an action which divested the mortgagor of rights, may

* The issue of privity does not arise. My claim as mortgagee arose when my mortgagor acquired title, which was a year prior to the commencement of the suit in which the title of the mortgagor was tried (the former date, as shown by the recordation of deeds, was in December 1959, the latter, in December 1960). "No one is privy to a judgment whose succession to rights of property affected thereby occurred prior to the commencement of the action in which the judgment was rendered." *Henschke* v. *Christian,* 36 N W 2d 547, 548, Minn. Supreme 1949, Syllabus by the Court.

again litigate the question resolved in the suit against his mortgagor. The state court judgment was not conclusive against me.

Summary of Argument

The district court in this matter did not try the issue between the parties on the merits. It relied exclusively upon a prior judgment in a state court proceeding. In the prior proceeding there was a total absence of due process as regards the judgment against me. In particular, it is not *res judicata* against me in the district court proceeding. The judgment of the district court is therefore a taking of property without due process of law. Our examination discloses a want of due process in the most elementary sense throughout the proceedings. This is the basis of the present petition for review of the District Court judgment and of its affirmance by the Court of Appeals.

REASONS FOR THE PETITION

The rules of your court covering applications for certiorari require me to offer reasons why this extraordinary remedy should be invoked.

Repudiation of Due Process

There are necessarily debatable fringes to a concept which spreads as wide as due process of law. But there is also a core which is axiomatic and beyond the scope of debate. The elements of the central core of due process are well known. In my argument, above, I have taken the liberty of describing them, as applies to the specific area of real property interest which concerns us here. I do not believe there is any ambiguity about what comprises due process in that area, and I believe I have shown that its

fundamental elements are absent in the proceedings below in this matter—absent not merely in one particular, but in all particulars. I cannot cite a case, because I know of no published cases in which so completely is due process of law absent. What federal judge has before published an opinion in which real property was divested with neither proof nor allegation before the court of any fact in support of the divestment, merely on the basis of a state decree which was itself entered wholly without process of law?

To review briefly, respondents, as plaintiffs in the district court, mindful, I suppose, that the decree in the state court was a nullity as to my interest, applied in the district court for a decree quieting their title and holding me to have no interest. I answered, asserting an interest and counterclaiming for a decree of the district court that the state court judgment was void as to my interest.

Respondents introduced no evidence in district court in support of their plea. They rested on the void judgment.

In that posture, the district court entered its judgment divesting me. It gave an Opinion citing the state judgment. It offered no other reason for divesting me. The district court judgment was affirmed, without Opinion, by the Circuit Court of Appeals.

This comprises a taking of property without due process. It is, indeed, without all semblance of it and presents a serious problem in jurisprudence.

The mischief, I will argue, does not lie in the decree of the state court, however improvident the entry of it may be and manifestly is. That decree, in a matter where I was not before the court, involved implicitly a divestment of real property without due process of law. But in the federal district court, I was a party. In the dispute, it was

my day in court. It was my only day in court. The judgment in that court is explicitly a determination that one may be divested in a state court without due process. Its judgment becomes an affirmative assertion by a federal court that due process of law is unnecessary to divest. It rests there.

It may be noted that I did not come into federal court against respondents. They came into court demanding divestment of my mortgages on the sole ground of a state court judgment which lacked all semblance of due process. This is the posture in which the district court judgment issued.

A holding that a federal court will divest without due process, and its affirmance, without opinion, by the Court of Appeals, is what I submit to your court as warranting review. It is a question of broad public import. There is not a property owner within the reach of federal jurisdiction whose interests are not affected.

To be sure, this decision affects the interest of only one property owner, myself. It may be said, there must have been a reason. Perhaps the court felt that I was a scoundrel. However, no allegation and no proof was presented to the court to the effect that I am or was a scoundrel. If that was the court's reason, it was mere whimsy. This is sharply distinct from due process. Even scoundrels, it may be noted, must have due process if due process is to exist at all.

Or perhaps there were other reasons. Whatever the motive which impelled the instant decision, it threatens due process of law throughout the jurisdiction, and is a proper subject for review in this court.

The Determined Court

The approach of the trial court to this litigation is illuminated by examining certain details.

i) In the Opinion of the trial court (Conclusion of Law) we find (Appendix, page 28a):

> **2. In accordance with the Amended Final Judgment of the Superior Court in Bron v. Weintraub, I find that Harvey was a party to the New Jersey litigation . . .**

This is of course a solecism. One becomes a party to litigation by being mentioned, not in the final judgment, but in the complaint.

ii) In the same Opinion, under findings of fact (Appendix, page 27a) we read that the Opinion of the New Jersey Supreme Court fixed the effective time of the trust it imposed on Hudson as running:

> **4. . . . from the date of the purchase of [Hudson's] deeds back in 1959.**

Reference to the Opinion in question (Appendix, page 11a) does not support the finding.

And again (Appendix, page 28a):

> **7. On September 10, 1966 Harvey filed a suit in New Jersey Superior Court against three of the present plaintiffs for vacation of the Amended Final Judgment as to their properties. On September 16, 1966 the suit was dismissed.**

The court might appropriately have added that the dismissal was *ex parte* and without notice to Harvey.[10] The

suit was dismissed at the request of counsel for my adversaries (present counsel), without notice to me either before or after.[20] The language of the Opinion might leave the impression that my application to the state court had been considered and denied. That was not the case. The application was not entertained and no adjudication was made.

iii) The Opinion (Appendix, page 26a) refers back for some of its facts to a previous Opinion of the same Court (*ibid.*, page 21a). Among them we find (*ibid.*, pages 23a, 24a):

> Harvey's part in this "heir-hunting" masquerade was duly criticized by the [New Jersey Supreme] Court . . . Harvey surely does not attempt to cloak himself in the robes of an innocent and detached third party. If he is making this claim he should be thoroughly chilled, having been stripped of these garments back in 1964 by Chief Justice Weintraub's precedent-setting opinion.

There was nothing before the (district) court at the time this was written to justify such language.* The observation is made apropos of the circumstance that I knew of

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* A single passage appears in the *Bron* (state court) opinion regarding Harvey. The language is derogatory (Appendix, page 4a). In reading it, one may bear in mind that Harvey was not before that court at the time. Specifically the reference is to a letter written by him. The interpretation placed on the letter is, as noted in the text *supra*, somewhat subjective and quite hostile. The court goes on to observe that it is not in possession of all the correspondence and that the letter is not a factor in its determination (*ibid.*, page 4a). The letter in question does not refer to the properties involved in this petition, but to other properties.[21]

In evaluating the (district) court's remarks cited in the text, it should be observed that the Opinion from which they are quoted was filed prior to the taking of testimony in that court.[22]

the state court litigation. I did know of it. I also knew that I was not a party to it; that I was not present in the proceedings before the Chief Justice on appeal; and that the Opinion there made no mention of nor determination of my interest.* The employment by the District Court in its Opinion of animadversions in place of facts is perhaps not untypical of the proceedings in that court.

iv) Upon the filing of the complaint below, I counterclaimed for relief—vacation of the state court judgment as to me as affecting three of the ten causes of action in the complaint. Appendix, page 20a. Meritorious grounds were set forth for this relief.

The time allowed by the rules of practice for plaintiffs to answer the counterclaim expired. Six months elapsed after that, and default judgment issued against plaintiffs for the relief prayed for in my counterclaim.

Shortly after that, plaintiffs moved to vacate the default judgment, on the score of inadvertence,[23] no excuse for inadvertence being offered.** On the return date of their own motion to vacate, plaintiffs did not appear.

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* The manner in which the issue was reached in the (state) litigation may be recounted. In the state trial court the issue was of title. On this issue, my grantor prevailed. Present respondents appealed. I could not have joined in that appeal, had I been a party, because a successful party cannot appeal a judgment. Elliott on Appellate Procedure 1892 Sec. 147. On the appeal, to which I was not made party, the issue was raised for the first time of trust *ex maleficio;* and it was on this issue and in the appeal that respondents prevailed. If respondents then were or now are to challenge my mortgage by that proceeding I was a necessary party, particularly to the appeal (*ibid.*, secs. 140, 144), and it was respondents' omission to name me that was specifically responsible, under the circumstances in which the issue was raised, for my failure to confront them in the state court.

** Plaintiffs' whole contention was "Inadvertently no answer was filed." [24]

Later, however, plaintiffs renewed their motion and the court vacated the default judgment against them.[25]

In so doing, the court exceeded its powers. The cases hold that a default judgment may be vacated, but not in the sole discretion of the trial court. There must be lawful grounds. *Ledwith* v. *Storkan,* 2 F R D 539, 541 [1] (Nebraska District 1962), *Consolidated Masonry & Fireproofing, Inc.* v. *Wagman,* 383 F 2d 249, 251 [4] (Fourth Circuit 1967), *Canup* v. *Mississippi Valley Barge,* 31 F R D 282 (Penn. W. District 1962), *Nelson* v. *Coleman,* 41 F R D 7, 10 [6] (South Car. District 1966).* In *Ledwith* we read:

> But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of "inadvertence or excusable neglect". If the showing be inadequate fairly to establish such "inadvertence† or excusable neglect", the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought.

The vacation of the default judgment, which was beyond the powers of the court, may well be described as a favor granted to the defaulting parties by the judge.

v) As an incident of the relief granted to respondents the judgment below directs the County Clerk to strike my mortgages from the record.[26]

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* On plaintiffs' failure to appear at hearing on their default, see *Rogers* v. *Lyle,* 372 P 2d 797, 800 [10] (New Mexico Supreme 1962).

† As qualified by the court. (Note by petitioner.)

To be sure, the judgment holds the mortgages to be not a lien against the properties of the suit. But the first mortgage by its terms[27] covers other properties, not involved in the suit. On what ground does the court divest me of these other properties? other than because it doesn't like me.

New Jersey law (N J S A 46:16-1.1)* permits recordation with the County Clerk of a federal court judgment affecting real property, and provides that such recordation is notice to all persons of the terms of the judgment and of the existence of the proceeding out of which it arose. Recordation of the judgment would therefore effect the complete remedy required by respondents. There was neither need nor authority for the court to cancel the mortgage of record. The cancellation is a taking of property, and as affecting the lands which are not embraced in the suit, it is a taking without process of law. It suggests an indifference to due process.

vi) Numerous minor statements of fact in the Opinion are also unsupported by evidence: e.g. (Appendix, pages 21a and following) that I am the assignee of Hudson; that an attempt was being made by the Township to perfect title to the lands in question by tax proceedings; that plaintiffs built homes; the reference to misleading negotiations; that I have acquired the interest of other defendants in the litigation; that I base my claim to the properties in question on the circumstance that they were omitted from the tax foreclosure action; that the state court had held Hud-

* Certified copies of . . . final judgments of courts of record of this State and of the United States . . . relating to or in any way affecting title to real estate may be recorded as deeds of conveyance in the office of the county recording officer . . . which when recorded shall from that time be notice to all subsequent judgment creditors, purchasers and mortgagees of the existence and contents thereof.

son to have acted in violation of the legal rights of the owners; that the judgment against me in the state court was entered "in accordance with the directions of the New Jersey Supreme Court"; that I assumed control of the litigation there. These various statements contribute their coloration to the picture painted by the court and are presumably intended to add equitable support to the conclusion that I should be divested of my interest. But in the absence of evidence they fail of such support. *Grell* v. *Kelly*, 134 N J Equity 593, 601 (Prerogative Court, 1944).

vii) The basic premise of the district court is as follows. The lands in question were owned by the heirs of Weintraub, but were occupied, without knowledge of that, by persons who had no title. Years later, the occupants suddenly became the owners solely by virtue of the fact and, the timing being essential, at the instant when the Weintraub heirs conveyed the property to Hudson Trading Corporation. In the absence of all prior dealings between the occupants and Hudson, this construction is fanciful. In the essential matter of timing, it does not conform very well (page 15 *supra*) with the earlier Opinion, in another court, on which it purports to be based. It is not, however, upon the unconvincing nature of the district court's premise that my argument is based. I am arguing rather a want of due process in relying on the earlier decision, in a matter where I was not before the court, as determinative against me here. The fragility of the logic of the district court in doing so seems, however, corroborative of its willingness to divest me without benefit of due process.

This section has been an examination into the details of the district court's decision. It discloses that the decision abandoned due process. The court, to be sure, does not

announce that to be its method. There are verbalisms and even some outright misstatements by way of doing obeisance to form. But the form, as our examination shows, lacks substance. In substance the decision says that due process is not necessary to divest.

Precedent

The case is without precedent. No decisions quite like it have been found. It is a case where a federal court brings in a judgment destroying a vested property right with no evidence before it which would warrant either a legal or equitable divestiture.

There was, to be sure, a void state court judgment. It is not unprecedented that a dubious judgment of a state court has been upheld by a federal court. But there had to be circumstances warranting it, and some proof of the circumstances. In this matter, the absence of proof in the federal court is matched only by the absence of proof in the state court. In both courts, trial of the facts is absent. The decision in the federal jurisdiction is a product of judicial caprice.

In this respect the case is one of novel imprint. Its value as precedent may be considered. The decision states that a mortgagee may be wiped out by a (state) proceeding to which the mortgagee is not a party, so long as the mortgagor is. If this proposition is vindicated the multi-billion dollar market for mortgages in the United States cannot fail to be impaired. A recorded mortgage will fail on a subsequent determination adverse to the mortgagor alone. It may be said in contravention that the circumstances of this case are special. True; but the circumstances of every case after differ from other cases. And when a new principle of law is established, even restricted to certain circumstances,

other cases arise in which litigants seek to widen the application.

What, generally speaking, the present decision states is that a grantee may be divested of real property, merely by implication in an action against his grantor which does not challenge the title of the grantee nor make him a party to the action. Whatever the circumstances of the transaction—and we have no evidence in the record as to what the circumstances were or were not, so that the determination, so this precedent tells us, is a matter of taste on the part of the trial judge—we are dealing here with a procedure which fractures the confines of due process. The opening in the wall, let us say, is narrow. It embraces only this case. But once the wall is breached for the single chariot, other vehicles will pass through. The breach will be widened to accommodate the traffic; and ultimately the mischief will cost dear.

A slow gestation of bad law is the foreseeable outcome. In the end the Supreme Court will be presented with it. This petition suggests it be dealt with now by choosing the present ill-conceived decision for review.

"To no man will We deny . . ."

Our government is of three mutually independent branches. In various areas one or another of these branches may be found sovereign. In the area we are discussing, real property of individuals, the courts are sovereign. No doubt it is conceivable that the executive might call out the militia to controvert a court order with respect to real property. The executive has been known to do something of the sort in other areas of law. But to my knowledge, no judgment of a court with respect to real property has been voided by an

executive in any federal jurisdiction in this century. The courts are sovereign there.

Prior to the Magna Carta, seven hundred years ago, the law was the caprice of the sovereign. Both the property and the necks of the subject were at the sovereign's discretion. His whim was their fate. It was the Magna Carta which gave courts the responsibility of replacing the whim of the sovereign with due process of law.

The decision for which review is here sought returns to the earlier condition. The proceeding in the federal district court, as we have seen, repudiates due process of law in the most fundamental sense. One will scarcely take seriously the court's stated position that one person is divested by a proceeding brought against others. The determination is essentially the whim of the judge, acting as sovereign. We are back to the century before the Magna Carta, where the sovereign supersedes both law and equity, and where due process of law was not required.

To be sure, this case affects only property. It does not jeopardize anyone's life or liberty. I feel sure that, if life or liberty were forfeit without due process, this court would intervene. It is proverbial that it will not intervene in matters arising in state courts affecting title to real property. In that area of law, judges, whether state or federal, need not limit themselves by due process precisely because they know that no higher court will review.

I have been assured by competent legal practitioners that it is so; that because the Supreme Court will not intervene in the given area, state courts can do what they please with the real property of individuals, and in so doing may slander as required. In the present matter the credo has

been embraced by a federal court. It is no longer in the realm of gossip. Affirmed, it has become a retrogressive element in the law of the land. It should not be allowed to stand.

Summary of Petition

In substance the question here presented is, where an individual by the decree of a federal court is divested of an estate in real property without a trial on the merits and solely on the basis of a void prior judgment of a state court, has due process of law been observed? It is argued here that such a decree, upheld, repudiates due process outright and turns over all real property in the United States for disposition to the unrestricted discretion of the state and federal judiciary.

The limitation on judicial power is review. Review is here requested.

HERBERT HARVEY,
pro se.

REFERENCE NOTES

1 Trial Exhibit DH-1. Transcript, pages 13, 16ff.

2 Trial Exhibit DH-11, page 83a (and see cover).

3 Transcript, page 17; Appendix, page 33a.

4 Transcript, *passim*.

5 *Ibid.*; Trial Exhibit DH-11, pages 47a and following.

6 Trial Exhibit P-2, last 3 counts.

7 Trial Exhibit DH-11, page 21a; Transcript, page 38.

8 Note 7.

9 Trial Exhibit P-2.

10 Note 7.

11 Trial Exhibit DH-11, page 87a.

12 Note 2.

13 Exhibit DH-11, page 35a, item 7.

14 Exhibit DH-11, pages 47a-71a. No record was kept in the upper court.

15 See, e.g., The Record, U.S.D.C. N.J. "Harvey Affidavit 1" at present bearing instrument number 23 in that court, paragraphs 39 and 41 in the document therein referred to, shown in the docket of the U.S. Court of Appeals for the Third Circuit as filed there April 30, 1973.

16 Transcript, pages 17ff.

17 Transcript, *passim*.

18 *Ibid.*

19 Transcript, pages 48 and 60; see documents of Note 15, reference par. 48.

20 *Ibid.*

21 As appears from a collation of the letter in question (Trial Exhibit DH-11, p. 64a), its date (Appendix, page 3a), the deed there referred to (Trial Exhibit DH-3) and the amended final judgment of the state court (Trial Exhibit P-2).

22 The Opinion was filed Feb. 16, 1971 (The Record, docket entry 2-17-71); testimony was heard June 1, 1972 (Transcript).

23 The Record, U.S.D.C. N.J., paper at present bearing instrument number 24, Affidavit, paragraph 2.

24 *Ibid.*

25 The Record, U.S.D.C. N.J. Docket entry for Dec. 20, 1969.

26 The Record, U.S.D.C. N.J. Final Judgment—paper at present bearing instrument number 48 last paragraph.

27 Trial Exhibit DH-1.

Instruments above cited will be designated by petitioner to the appropriate clerks to be certified as portions of the record.

APPENDIX

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

THEODORUS BRON, *et al.*,
Plaintiffs-Appellants,

vs.

HARRY WEINTRAUB, *et al.*,
Defendants-Respondents.

HUDSON TRADING CORPORATION, *et al.*,
Plaintiffs-Respondents,

vs.

EMILE W. SAULNIER, *et al.*,
Defendants-Appellants.

(Filed April 20, 1964.)

Mr. Robert N. Wilentz argued the cause for appellants (*Messrs. Wilentz, Goldman & Spitzer,* of counsel; *Messrs. Boyd, Dodd, Keer & Booth,* attorneys).

Mrs. Sylvia B. Pressler argued the cause for respondents.

The opinion of the Court was delivered by WEINTRAUB, C. J.

In 1935 the Township of Woodbridge sold certain vacant lands for unpaid taxes and itself was the buyer at the sale. In 1940 it foreclosed the tax sale certificates in the former Court of Chancery. That proceeding ran against Danwil

Developers, Inc., as owner. However, in 1929 that company had conveyed to El-Ka Holding Co., Inc., which in turn conveyed to Harry Weintraub in 1931. Weintraub apparently was the secretary of both corporations. He died intestate in 1933, survived by two sisters who lived in California. The searcher did not pick up the conveyances just mentioned and hence the 1940 foreclosure suit ran only against Danwil Developers, Inc., as we have said.

In 1952 Woodbridge conveyed the lands to a developer who erected homes and sold them for $10,000 to $11,000 each. Ten such parcels are here involved. In 1959 one of the homes was resold and a search in that connection revealed the failure to bar the Weintraub interests. The township was asked to foreclose those interests, and it started a suit to that end. *N.J.S.A.* 54:5-86.1 *et seq.* Judgment was entered fixing November 13, 1959 as the date by which the unknown heirs of Weintraub had to redeem or be barred. At the eleventh hour Hudson Trading Corporation and Frank Altomare redeemed on the basis of deeds obtained from the Weintraub heirs (the deeds ran to Hudson which in turn conveyed a quarter interest to Altomare).

The present actions ensued, the householders seeking to quiet title and Hudson and Altomare demanding possession and mesne profits. Hudson and Altomare conceded the householders were equitably entitled to remove the improvements or to buy the land at its value unaffected by the improvements. The trial court entered a judgment under which the householders would have to pay for the land the sum of $19,555.11, found to be its value as of the time of the deeds to Hudson and Altomare, plus mesne profits of $2,856.91. Hudson had paid the Weintraub heirs but $400. The Appellate Division affirmed and we granted certification. 40 *N. J.* 507 (1963).

The householders urge that Hudson and Altomare be declared constructive trustees and be required to convey title upon payment of the $400 they gave the Weintraub heirs. Alternatively they say the lands should be valued as of a date prior to the date of the deeds to Hudson, and that, whatever date is approved, the lands should be valued without enhancement due to streets, sidewalks, sewers, and curbing. As to the last proposition, it is unclear whether the appraisers had excluded those items in valuing the "unimproved" land.

We need consider only the first proposition, that Hudson and Altomare should receive no more than what they paid the Weintraub heirs, since we are satisfied the householders are entitled to prevail upon it.

Here ten homes were purchased in the *bona fide* belief that title was good. The defect in the 1940 foreclosure was discovered in 1959, some 28 years after the original owners of the vacant land had last paid a penny of taxes. The municipality started a second suit to perfect the title, and in that action it was necessary to advertise as against the Weintraub heirs. In that way Hudson learned of an opportunity to make some money out of the predicament of these householders.

Hudson located Weintraub's sisters in California. Exactly when we do not know, but on November 7, only six days before the date fixed for redemption, one Herbert Harvey wrote to them. His letter opened with a statement that it related to "lots in Middlesex County, New Jersey, in which, according to the record, the late Harry Weintraub had an interest." That the interest was ownership in fee was not disclosed. The letter correctly said the property was sold for taxes in 1935 and a foreclosure action was brought in 1940, but added only that the foreclosure action was deemed "possibly defective." It continued that "you

might claim an interest" and we are writing to inquire whether you "will furnish a voluntary release of your possible claim" for a "courtesy consideration" of $50 "for the release." It adds that "The required instrument, in the form of a quit claim deed, is enclosed." We interpolate that trial counsel for Hudson and Altomare placed on the record:

> "It is Mr. Harvey's practice to take quit-claim deeds. I say that of all the deeds he gets, 90 percent are quit-claim deeds. He knows by law a quit-claim deed is just as good as any other kind of deed."

Mr. Harvey was well informed in that regard, *N.J.S.A.* 46:5-1 *et seq.*, but we assume, as no doubt he did, that the recipient of his letter would likely think only of some claim to be released to the existing holder of title in fee. Indeed the letter said the deed "will have the effect of releasing any claim which you have or may have in the land therein described." Finally the letter noted that "this instrument will serve its purpose only if it reaches us without delay—actually no later than November 13, which seems practically return mail." Appreciation was promised for "your co-operation" and the letter closed "With thanks for your courtesy in the matter."

This letter was palpably deceptive. It was deceptive as to the nature of the outstanding interest. It was deceptive as to identity of the parties on whose behalf it was written. In the latter respect, if no more appeared, it would permit an inference that Harvey led the Weintraub heirs to believe he was acting for the householders, and upon such a finding a constructive trust could be imposed in their favor. *Bell v. Smith*, 159 *Fla.* 817, 32 *So. 2d* 829 (*Sup. Ct.* 1947), annotated 175 *A. L. R.* 700 (1948). The cause, however, was not tried on the theory of fraud, and since we are told there were

further communications with the Weintraub heirs not spread on the record, we should not decide the case on that basis. Nonetheless we refer to the fraudulent nature of this communication as a sample of the kind of thing to be expected if we hold that strangers may exploit these situations.

Let us look at the interests involved and the impact of Hudson's activities upon them.

We are dealing with tax titles. Contrary to early hostility to such titles, the policy today is to support them, thereby to aid municipalities in raising revenue. To that end *N.J.S.A.* 54:5-85 provides:

> "The provisions of this article shall be liberally construed as remedial legislation to encourage the barring of the right of redemption by actions in the Superior Court to the end that marketable titles may thereby be secured."

Everybody knows that taxes must be paid. True, there may be instances in which the individual concerned is unaware of his property interest, but such cases are rare. Usually the owner omits to pay knowing the end result will be a tax sale. It is therefore understandable that the Legislature found it fair to bar the right to redeem by a strict foreclosure, *i.e.*, by a judgment that payment be made by a fixed date, in default of which the right to redeem shall end, rather than by a sale as in the case of the foreclosure of a mortgage. The point we stress is that, whereas with respect to the initial sale for taxes, the statute intends to attract third parties to the opportunity to acquire the property and provide for public notice to that end, *N.J.S.A.* 54:5-25 and 26, there is no like policy to invite the public to participate with respect to the foreclosure of the right to redeem. In *Mitsch v. Owens*, 82 *N. J. Eq.* 404 (*Ch.* 1913),

in holding that an earlier tax statute did not require a foreclosure by sale, Chancellor Walker said (*p.* 406):

> "In my judgment, the law does not intend to make provision that a total stranger may deprive the purchaser at a tax sale of his right to perfect his title, by strict foreclosure, on the one hand, or usurp the owner's right to redeem, by permitting the land to be bought away from him, on the other hand."

Hence the foreclosure process concerns only the holder of the tax sale certificate and the holders of existing interests in the property. Hudson learned of this situation, not because it was the policy of the law to advertise to solicit its interest, but because of the fortuitous circumstance that the foreclosing municipality had not located the Weintraub heirs. If they had been found, they could have been served without the need for publication. *R. R.* 4:4-5. In short, our rules of court called for this public notice solely to reach the holders of existing interests, but Hudson read a communication intended for another and sought to turn that information to its own gain, thereby depriving the householders of a chance to work out their misfortunes with the holders of the outstanding interests upon a basis presumably no more onerous than the basis upon which Hudson acquired those interests.

In attacking the legality of Hudson's activity, the householders appeal to public policy, the ultimate source of justice. Public policy has been described but never quite defined. *Ready v. National State Bank of Newark,* 117 *N. J. L.* 554, 559 (*E. & A.* 1937); *Girard Trust Co. v. Schmitz,* 129 *N. J. Eq.* 444, 456-60 (*Ch.* 1941). The Supreme Court of Ohio said in *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Kinney,* 95 *Ohio St.* 64, 68, 115 *N. E.* 505, 506 (1916):

"What is the meaning of 'public policy'? A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare.' In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, even though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court. • • • "

Reflecting as it does the common conscience, public policy changes in its demands with the needs and the widely held feelings of the times. *Henningsen v. Bloomfield Motors, Inc.*, 32 *N. J.* 358, 403 (1960). As was said in *Brooks v. Cooper*, 50 *N. J. Eq.* 761, 769 (*E. & A.* 1893):

> "It has been declared that public policy is a variable quality, but the principles to be applied have always remainded unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required. *Davies v. Davies*, 36 *Ch. Div.* 364.
>
> Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement."

Despite the apparent abstractness of the concept of public policy in its restraint upon individual conduct, there is a large measure of guidance and predictability, for as Professor Corbin points out, men of probity and intelligence can greatly reduce the risk "by an unselfish use of conscience and common sense." 6A *Corbin, Contracts* § 1374, *p.* 6 (1962). His discussion is worth repeating (*p.* 6):

> "There is still another source of 'illegality,' besides statute and judicial decision. That source is the great common background of life from which come both legislation and common law. It is the prevailing practices of the community of people and their notions as to

what makes for the general welfare. Bargains are judged by the folkways and mores of the time. A bargain may be illegal because it is contrary to 'Public Policy,' as that is understood by the judges and administrative officers.

A man of business can not escape feelings of uncertainty if the legality of his bargains is to be determined in this fashion. How can these officials know 'public policy,' a matter as to which there is often such violent disagreement? And how can a layman determine what the officials will decide? Here, again, however, we shall advise that a man of probity and intelligence can avoid excessive risk without materially nullifying his enterprise. In most of his transactions the question of legality does not in fact arise. In most of those in which it does arise, the public policies involved have already been declared by statute or judicial decision. In the number remaining, some of which may be very important indeed, he knows that he will be judged by the practices and opinions of his fellow men, practices and opinions in the midst of which he was born and by which his own mind and conscience have been formed and educated. For a man of probity and intelligence, the risk involved in making a decision and acting on it need not be very great. But 'probity' varies in degree, and intelligence may be lacking. Many men have believed that they were unjustly penalized for action wholly consistent with the public welfare. It is true that lack of probity and a minimum of intelligence may be found in the officials who decide as well as in the man who bargains. That is a risk that we can not wholly avoid, even in a democratic society. The best advice that can be given in this small residuum of cases is that risk of illegality can be avoided only

by leaning over backwards and deciding against one's own interest. The bold and resolute may fight and win; but they should be prepared to take the medicine if they lose."

With respect to the factual pattern before us, no one disputes the right of the holders of existing interests to convey them to third persons if they wish.[1] What is challenged is the legality of the intrusion into the scene by third persons who seek only to further their own interests rather than the interests already on hand. As we have pointed out, the policy of the statute is to support tax titles, a policy which overall is burdened by the conduct before us. The burden upon individuals situated as are the householders in this case is evident enough. These manifest hurts should not be tolerated unless it can be said that some other legitimate interest or advantage is served. We find none. We see no social value or contribution in the activities of Hudson. On the contrary, decent men must sense only revulsion in this traffic in the misfortunes of others.

We are not aware of any precedent precisely in point, although reference could appropriately be made to the established hostility toward so-called "heir-hunting." See *Carey* v. *Thieme*, 2 *N. J. Super.* 458, 466 (*Ch. Div.* 1949); Annotation, 171 *A. L. R.* 351 (1947); note, 7 *Vand. L. Rev.* 104 (1953). In any event, public policy is more than a

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[1] We note that in some jurisdictions there may not be a sale of an interest in lands adversely held by another. See 10 *Am. Jur., Champerty and Maintenance* § 18, *p.* 563. This rule originated in an English statute which antedated the Revolution and which was held not to be effective in our State. The issue was initially left open in *Den* v. *Geiger*, 9 *N. J. L.* 225, 234-35 (*Sup. Ct.* 1827), and later resolved, as we have said, in *Schomp* v. *Schenck*, 40 *N. J. L.* 195, 206 (*Sup. Ct.* 1878). See also *Bouvier* v. *Baltimore & New York Ry.*, 67 *N. J. L.* 281, 291 (*E. & A.* 1902).

mere summation of its past applications. It has been said that "Its virtue and vigor lie in its flexibility of application, and while reported cases furnish guides, they rarely are compelling as precedent." *Fidelity Union Trust Co. v. Reeves*, 96 *N. J. Eq.* 490, 493 (*Ch.* 1924), affirmed o.b. 98 *N. J. Eq.* 412 (*E. & A.* 1925). As Judge Desmond said in *Latham v. Father Divine*, 299 *N. Y.* 22, 27, 85 *N. E.* 2*d* 168, 170 (*Ct. App.* 1949), the applicability of the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." We have no doubt the common conscience condemns the conduct of Hudson and Altomare as an undue interference with the rights of the householders. Hudson and Altomare having acquired the outstanding title under "circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same." 4 *Pomeroy, Equity Jurisprudence* (5*th ed.* 1941) § 1053, *p.* 119. The householders are equitably entitled to the property upon the payment of the sum of $400 plus simple interest from the date of the payment to the Weintraub heirs.

The judgments are therefore reversed and the matters remanded to the trial court with directions to enter judgments in harmony with this opinion.

Note by petitioner—Of the foregoing Opinion, covering two cases, only the portions dealing with *Hudson* v. *Saulnier* are in point. Petitioner could segregate those portions and omit the rest. Respondents might dispute the allocation. For this reason the whole Opinion has been reproduced here.

Complaint to Quiet Title

(Filed March 6, 1969)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—MIDDLESEX COUNTY

Docket No. C 1247-68

THEODORUS BRON and HEILTYI A. BRON, ANGELO A. CIFRODELLA and GLORIA C. CIFRODELLA, JOHN CLARENCE KEITEL and JOAN A. KEITEL, JOHN LAWRENCE LYONS and MARGARET F. LYONS, JOSEPH FRANCIS MORAN and ELEANOR MORAN, RICHARD G. REACH and VIOLA H. REACH, EMILE W. SAULNIER and JEANNETTE C. SAULNIER, FRANCIS J. STRAULINA and VIRGINIA D. STRAULINA, JOHN TYBOROWSKI and STASIA M. TYBOROWSKI, JOHN A. VATICANO and ALICE G. VATICANO,

Plaintiffs,

—VS.—

HERBERT HARVEY and MARY HARVEY, his wife, said MARY being a fictitious name; HUDSON TRADING CORPORATION, a New Jersey corporation; FREDA SOLOMON and JOHN SOLOMON, her husband, said JOHN being a fictitious name; FRANK ALTOMARE and MARY ALTOMARE, his wife, said MARY being a fictitious name,

Defendants.

[COUNTS ONE TO FOUR, SIX, NINE AND TEN OMITTED]

COUNT FIVE

Plaintiffs Joseph Francis Moran and Eleanor Moran, his wife, residing at 69 W. Arthur Place, Iselin, Township of Woodbridge, Middlesex County, State of New Jersey say:

1. On February 11, 1953 Parkway Gardens, Inc., a New Jersey corporation, conveyed to the plaintiffs, Joseph Francis Moran and Eleanor Moran, his wife, the following described lands and premises situate in the Township of Woodbridge, County of Middlesex, State of New Jersey, and being more particularly described as:

> BEGINNING at a point in the northerly side of Arthur Place therein distant 120′ westerly from the intersection thereof with westerly side of Semel Avenue; thence (1) North 8° 43′ 30″ East 100′ thence (2) North 81° 16′ 30″ west 60′ thence (3) South 8° 43′ 30″ West 100′ to the said side of Arthur Place; thence (4) along the same south 81° 16′ 30″ East 60′ to the place of BEGINNING.
>
> BEING also known as Lots 27, 28, 29 Block 486-J on "Map of Lincoln Manor, Iselin, N.J. dated 1925" and filed in the Middlesex County Clerk's Office on March 27, 1925 as Map 1068 File 617.

2. Said deed of conveyance was recorded in the Middlesex County Clerk's Office on February 19, 1953 in Deed Book 1669, Page 55.

3. Said title was also vested by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C754-60, L 6513-60, recorded July 2, 1964 in Book 2463, Page 1085 A etc.

4. Plaintiffs have been in peaceable possession of such lands ever since the recording of such deed and thereafter

have always claimed to own the same, previous claims of the defendants and/or others having been resolved in favor of the plaintiffs as appears by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C-754-60, L-6513-60, recorded July 2, 1964, in Deed Book 2463, page 1085-A, etc.

5. Plaintiffs' title to such lands or to some part thereof are denied or disputed by the defendants who claim to own the same or some part thereof, or some interest therein or to hold some lien or encumbrance thereon.

6. No action is pending to enforce or test the validity of the defendants' title, interest, lien or encumbrance thereon.

COUNT SEVEN

Plaintiffs Emile W. Saulnier and Jeannette C. Saulnier, his wife, residing at 557 Semel Avenue, Iselin, Township of Woodbridge, County of Middlesex, State of New Jersey say:

1. On September 9, 1953 Iselin Oaks, Inc., a corporation of the State of New Jersey, conveyed to the plaintiffs, Emile W. Saulnier and Jeannette C. Saulnier, his wife, the following described lands and premises situate in the Township of Woodbridge, County of Middlesex, State of New Jersey, and being more particularly described as:

> BEGINNING at the intersection of the northerly side of Edward Street with the westerly side of Semel Avenue; thence (1) along the said side of Semel Avenue North 8° 43′ 30″ East 70′ thence (2) North 81° 16′ 30″ West 100′ thence (3) South 8° 43′ 30″ West 70′ to the said side of Edward Street thence (4) along the same south 81° 16′ 30″ East 100′ to the intersection aforesaid at the place of BEGINNING.

BEING also known as Lots 31, 32, 33 and the southerly ½ of Lot 34 in Block 486-G on "Map of Lincoln Manor, Iselin, N.J. dated 1925" and filed in the Middlesex County Clerk's Office on March 27, 1925 as Map 1068 File 617.

2. Said deed of conveyance was recorded in the Middlesex County Clerk's Office on September 9, 1953 in Deed Book 1706, page 4.

3. Said title was also vested by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C754-60, L 6513-60, recorded July 2, 1964 in Book 2463, Page 1085 A etc.

4. Plaintiffs have been in peaceable possession of such lands ever since the recording of such deed and thereafter have always claimed to own the same, previous claims of the defendants and/or others having been resolved in favor of the plaintiffs as appears by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C-754-60, L-6513-60, recorded July 2, 1964, in Deed Book 2463, page 1085-A, etc.

5. Plaintiffs' title to such lands or to some part thereof are denied or disputed by the defendants who claim to own the same or some part thereof, or some interest therein or to hold some lien or encumbrance thereon.

6. No action is pending to enforce or test the validity of the defendants' title, interest, lien or encumbrance thereon.

COUNT EIGHT

Plaintiffs Francis J. Straulina and Virginia D. Straulina, his wife, residing at 73 W. Arthur Place, Iselin, Township of Woodbridge, County of Middlesex, State of New Jersey say:

1. On January 13, 1954 Parkway Gardens, Inc., a New Jersey corporation, conveyed to the plaintiffs Francis J. Straulina and Virginia D. Straulina, his wife, the following described lands and premises situate in the Township of Woodbridge, County of Middlesex, State of New Jersey, and being more particularly described as:

> BEGINNING at a point in the northerly side of Arthur Place therein distant 60′ westerly from the intersection thereof with the westerly side of Semel Avenue; thence (1) North 8° 43′ 30″ East 100′ thence (2) North 81° 16′ 30″ West 60′ thence (3) South 8° 43′ 30″ West to the said side of Arthur Place; thence (4) along the same South 81° 16′ 30″ East 60′ to the place of BEGINNING.
>
> BEING also known as Lot 30 and the westerly 40′ of Lots 31 to 35 inclusive in Block 486-J on "Map of Lincoln Manor, Iselin, N.J. dated 1925" and filed in the Middlesex County Clerk's Office on March 27, 1925 as Map 1068 File 617.

2. Said deed of conveyance was recorded in the Middlesex County Clerk's Office on January 15, 1954 in Deed Book 1728, Page 478.

3. Said title was also vested by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C754-60, L 6513-60, recorded July 2, 1964 in Book 2463, Page 1085 A etc.

4. Plaintiffs have been in peaceable possession of such lands ever since the recording of such deed and thereafter have always claimed to own the same, previous claims of the defendants and/or others having been resolved in favor of the plaintiffs as appears by final judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C-754-60, L-6513-60, recorded July 2, 1964, in Deed Book 2463, page 1085-A, etc.

5. Plaintiffs' title to such lands or to some part thereof are denied or disputed by the defendants who claim to own the same or some part thereof, or some interest therein or to hold some lien or encumbrance thereon.

6. No action is pending to enforce or test the validity of the defendants' title, interest, lien or encumbrance thereon.

Wherefore plaintiffs demand judgment:

(a) That the defendants have no title to, nor interest in, nor encumbrance upon such lands.

(b) That the plaintiffs have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

(c) That the mortgage to Herbert Harvey in Mortgage Book 1633, Page 563, in the sum of $2,500 is not a lien on the plaintiffs' premises.

(d) That the mortgage to Herbert Harvey in Mortgage Book 1865, Page 107, re-recorded in Mortgage Book 1870, Page 249, in the sum of $22,500, which mortgage was subsequently assigned to Rockland National Bank, a corporation organized and existing under the laws of the United States, and subsequently assigned to Freda Salomon in Assignment of Mortgage Book 289, Page 56, is not a lien on the subject premises.

(e) That the Clerk of the County of Middlesex be ordered to indicate that the aforesaid mortgages are cancelled.

(f) For costs.

WILENTZ, GOLDMAN & SPITZER
Attorneys for plaintiffs

Answer and Counterclaim

Filed March 11, 1969

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: MIDDLESEX COUNTY
Docket No. C 1247-68
Civil Action

THEODORUS BRON, *et als.*,

Plaintiff

vs.

HERBERT HARVEY, *et als.*,

Defendants

HERBERT HARVEY, 537 Stevens Road, Morrisville, Pennsylvania 19067, hereinafter "defendant", answers the complaint in the captioned matter as follows:

ANSWER

1. Defendant is without knowledge or information sufficient to form a belief of the truth of the averments of paragraphs 1, 2, 3 and 4 of each of Counts 1 through 10 inclusive of the Complaint, which averments are moreover in part in the nature of legal conclusions or matters to be legally determined. Defendant therefore puts plaintiffs to their proofs of such averments.

2. Defendant admits the averments of paragraphs 5 and 6 of each of Counts 1 through 10 inclusive of the Complaint.

FIRST AFFIRMATIVE DEFENSE

Defendant does not challenge the possession of the premises in question by plaintiffs, but seeks relief against those, including plaintiffs themselves, who question the validity

of defendant's mortgage liens upon the lands occupied by plaintiffs. Earlier mortgages were executed by plaintiffs; defendant claims that those earlier mortgages were a nullity, having been executed by persons who did not own the land and having been procured and defended by frauds committed by the mortgagee of those mortgages against the mortgagors, and defendant will make no claim under his mortgages, assumed held valid, in excess of the claim made upon plaintiffs under the earlier mortgages, and then only if the said earlier mortgages are invalid.

SECOND AFFIRMATIVE DEFENSE

By virtue of the allegations of the First Affirmative Defense hereof, plaintiffs are not the real parties in interest in this action, the effect of which will be solely to test and protect the claim of the procuror and holder of the said earlier mortgages from the consequences of a mistake and fraud committed by the former at the cost in suffering of the plaintiffs and at the cost in money terms of defendant. Defendant proposes to bring into Court the procuror and holder of the aforesaid earlier mortgages to try their claims as against defendant.

THIRD AFFIRMATIVE DEFENSE

The matter of defendant's mortgages, liens or equitable liens upon the lands of this action is, wholly or in part, res judicata in defendant's favor and against the plaintiffs in the present action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs come into court with unclean hands by reason, in part, of their having secured (in the matter of Bron vs. Weintraub) a judgment and determination of the matters before the Supreme Court of New Jersey and before Superior Court of New Jersey affecting the lands of this action

by the untrue, misleading and malicious representations of plaintiff's counsel to the Court.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs are guilty of fraud by reason of the fraudulent process by their counsel in the determinations of prior matters set forth in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

The judgments pleaded in the Complaint are illegal and as such unenforceable.

COUNTERCLAIM

Herbert Harvey, residing at 537 Stevens Road, Morrisville, Pennsylvania, by way of counterclaim against plaintiffs, says:

1. Defendant repeats and realleges all of the allegations of the First through Sixth Affirmative Defenses hereof respectively, by virtue whereof he demands dismissal of the Complaint;

2. Because of the foregoing, defendant demands vacation of the judgment entered in this Court against defendant Herbert Harvey in the matter of Hudson Trading Corporation vs. Emil W. Saulnier et ux, Joseph Francis Moran et ux and Francis J. Straulina et ux, Docket No. L 6513-60, those individuals being among the parties to the within action.

WHEREFORE defendant demands vacation of the aforementioned judgment together with costs of suit.

Herbert Harvey
attorney pro se

Opinion of the District Court Denying Summary Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 482-69

THEODORUS BRON *et alii*,

Plaintiffs,

v.

HERBERT HARVEY *et als.*,

Defendants.

ON MOTION FOR SUMMARY JUDGMENT

Appearances:

WILENTZ, GOLDMAN & SPITZER, Esqs.
By: BARRY D. MAURER, Esq.
Attorneys for plaintiffs.

HERBERT HARVEY
Pro se.

WHIPPLE, District Judge:

Defendant Herbert Harvey seeks to have this court vacate the Amended Final Judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket Nos. C 754-60 and L-6513-60 (*Bron, et al.* v. *Weintraub, et al.*), entered June 26, 1964. Harvey claims that he was not a party in that action and yet his name appeared among

those who were divested of their property by order of the Superior Court in the above judgment. This relief is sought by way of a motion for summary judgment as to Harvey's three counterclaims raised in the present action. A brief recitation of the complicated factual situation leading up to this latest motion is necessary before I proceed further.

In 1933 one Harry Weintraub died leaving his heirs, Bessie Sachs and Rose King, a number of pieces of property in Middlesex County. Subsequently, the Township of Woodbridge tried to acquire these lands by a judgment of foreclosure. Thinking it had good title, Woodbridge sold by deed these properties to private developers in 1952 and 1953 who, in turn, sold them individually to the various plaintiffs in this action. The plaintiffs built homes thereon and were in quiet possession until one owner, trying to sell his home, discovered that the Weintraub heirs had never been properly barred. The Township of Woodbridge immediately sought to correct the error by fixing the date that the unknown heirs of Weintraub must redeem or be barred. The defendant Harvey, acting through a now defunct corporation, Hudson Trading Corporation, was instrumental in locating the Weintraub heirs and by skillful and misleading negotiation (see *Bron* v. *Weintraub,* 42 N. J. 87, 90-91 (1964)) he obtained quitclaim deeds on all these properties for a token payment. Seeing their predicament the home owners sought quiet title actions (7 properties) and Hudson Trading Corporation sought possession (3 properties). These actions were consolidated in Superior Court on April 5, 1962 (*Bron* v. *Weintraub,* C 754-60, and *Hudson* v. *Saulnier,* L 6513-60). After a stormy legal voyage the State Supreme Court ordered that the home owners should remain in possession and obtain full title by paying to Hudson

Trading Corporation the sum of $400. plus interest. *Bron v. Weintraub,* supra. The Court reasoned that public policy demanded a constructive trust should be imposed upon Hudson Trading Corporation because the defendant's conduct was an undue interference with the rights of the home owners. Harvey's part in this "heir-hunting" masquerade was duly criticized by the Court and there is no doubt in the mind of this Court that he was fully aware of all aspects of these proceedings. In fact, Harvey is only here today because as the principle creditor of Hudson Trading Corporation and subsequent assignee of mortgages which passed through Hudson he had a considerable stake in the outcome of that earlier litigation.

In the present suit Harvey, who has now acquired the interests of the other defendants, seeks to establish that the three properties which are the subject of his counterclaim should be treated differently than the other seven properties because these three were never properly incorporated into the early attempt to foreclose by the Township of Woodbridge, hence the Supreme Court of New Jersey should not have included them in the constructive trust imposed on all of the Weintraub properties and in addition the amended judgment should not have included any mention of Harvey's interest. Specifically, Harvey objects to the inclusion of his name in that Amended Judgment entered on June 24, 1964.

The evidence which this Court has had before it and the record of the prior legal proceedings in state courts indicates that Harvey was certainly a party to all these proceedings, not in the ordinary sense, but definitely in the real sense. The remarks attributed to Judge Kingfield which counsel for the plaintiff cites in the pretrial memorandum affirm this conclusion.

At best throughout these proceedings Harvey has succeeded in confusing all parties including the Court with his endless recitations of fact and opinion. It is difficult to see what benefit Harvey would derive even if this Court were to vacate the judgment in question, since as a mortgagee and assignee of parties to the original suit he could not emerge with any better title to these properties than his mortgagor or assignor. As regards the question of notice, Harvey surely does not attempt to cloak himself in the robes of an innocent and detached third party. If he is making this claim he should be thoroughly chilled, having been stripped of these garments back in 1964 by Chief Justice Weintraub's precedent-setting opinion. *Bron* v. *Harvey*, supra.

In accordance with the foregoing opinion I find that Harvey's legal arguments raised at this juncture do not entitle him to summary judgment, and in addition there are still complicated factual issues whose resolution would be necessary in any event before defendant's motion for summary judgment could be granted. Rule 56(c) Fed.R.Civ.P. See, e.g., *Bolt Associates, Inc.* v. *Alpine Geophysical Associates, Inc.*, 365 F.2d 742 (3d Cir. 1966); *Sarnoff* v. *Ciaglia*, 165 F.2d 167 (3d Cir. 1947).

An appropriate order shall be submitted, consented at least as to form.

LAWRENCE A. WHIPPLE
United States District Judge

Opinion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 482-69

THEODORUS BRON *et alii*,

Plaintiffs,

v.

HERBERT HARVEY *et als.*,

Defendants.

Appearances:

WILENTZ, GOLDMAN & SPITZER, Esq.
By: BARRY D. MAURER, Esq.
Attorneys for plaintiffs.

HERBERT HARVEY
Pro se.

WHIPPLE, District Judge:

Plaintiffs seek in this action to quiet title to ten parcels of property located in the Township of Woodbridge, New Jersey. All the plaintiffs presently reside on the lands in question. The defendants have held themselves out as mortgagees of these parcels. This case was heard by the Court without a jury and the issue presently before the Court concerns the validity of the mortgages currently

held by defendants Harvey, a resident of Pennsylvania, and Freda Solomon, a resident of New York. The complicated facts of the case have been set forth by this Court in its Opinion dated February 16, 1971 denying Harvey's motion for summary judgment on the counterclaim. An even more extensive statement of the facts is set forth in the New Jersey Supreme Court opinion, *Bron, et al.* v. *Weintraub*, 42 N. J. 87 (1964). It is the result reached in that opinion which gave rise to the present action. I hereby adopt the facts as set forth in those earlier opinions with the addition of the following findings:

1. Defendants Hudson Trading Corp. and Frank and Mary Altomore are no longer parties to this suit, having advised the Court through their attorney that they were giving up all defenses and interest in this litigation.

2. Herbert Harvey's present claim as a mortgagee of all ten properties is based upon a blanket mortgage by Hudson Trading Corp. to Harvey dated August 10, 1956, (Harvey's Exhibit 1) which covered all after acquired property in Middlesex County. That mortgage was recorded on August 13, 1959 in Book 1633 of Mortgages, page 563, Middlesex County, New Jersey.

On July 7, 1962, one month after the Superior Court decision awarding title to Harvey, Hudson Trading Corp. and Altomare, but before judgment had been entered and before an appeal was taken, Hudson Trading Corp. mortgaged to Harvey the ten properties in question. This was in addition to his earlier mortgage. This mortgage was recorded on December 5, 1962 in Book 1865 of Mortgages, page 107, Middlesex County, after the notice of appeal had been filed in the Appellate Division of the Superior Court. On December 28, 1962 this mortgage was assigned to the Rockland National Bank and recorded on January 8, 1962

in Book 258 of Assignments, page 51, Middlesex County, New Jersey, and in July 1966 Rockland National Bank assigned it to Freda Solomon and recorded same on October 24, 1966 in Book 289 of Assignments, page 569, Middlesex County, New Jersey.

4. On April 20, 1964 the New Jersey Supreme Court in *Bron* v. *Weintraub*, supra, held that Hudson Trading Corp. and Altomare held the ten properties in question as constructive trustees for the benefit of the householders (plaintiffs here) from the date of the purchase of the deeds back in 1959.

5. In accordance with the directions of the New Jersey Supreme Court the Superior Court of New Jersey entered an Amended Final Judgment on June 26, 1964. That Court held Hudson Trading Corp. and Altomare to be constructive trustees for the plaintiffs, and that upon the payment of $400. plus interest, said defendants were to execute and deliver to the plaintiffs deeds to the respective properties, and that in the event of failure of the defendants to do this, the judgment would have the same force and effect as if the conveyance had been done by way of a deed. The judgment further provided that upon payment of the said sum, all adverse parties in interest, including Herbert Harvey, were to "have no estate, interest or right in or lien or encumbrances upon said lands and premises or any part thereof described in said Complaint and in this judgment;" and the judgment further provided that as relates to any claims made on behalf of the defendants to the lands in question, that the title to said premises was determined, settled and decreed to be good.

6. The Amended Final Judgment was appealed by Hudson Trading Corp. and Altomare. The New Jersey Su-

preme Court, on its own motion, certified the appeal and affirmed the judgment. Thereafter, Harvey assumed control of the litigation and he filed a petition for a Writ of Certiorari in the United States Supreme Court attacking the Amended Final Judgment. Certiorari was denied on November 15, 1965.

7. On September 10, 1965 Harvey filed a suit in New Jersey Superior Court against three of the present plaintiffs for vacation of the Amended Final Judgment as to their properties. On September 16, 1966 the suit was dismissed.

8. The deposition of Freda Solomon introduced in evidence indicates that she is a business associate of Harvey and that with respect to the assignment of the mortgage from Rockland National Bank to her she relied upon the advice of Harvey.

Conclusions of Law:

1. In accordance with the New Jersey Supreme Court's ruling in *Bron* v. *Weintraub,* supra, I find that Hudson Trading Corp. and Altomore held the ten parcels of property as constructive trustees for the benefit of the present plaintiffs. This trust reached back and attached from the moment they purchased the deeds from the Weintraub heirs.

2. In accordance with the Amended Final Judgment of the Superior Court in *Bron* v. *Weintraub,* I find that Harvey was a party to the New Jersey litigation, had notice of the proceedings, and is bound by the judgment of that Court. In addition, his claims as mortgagee of Hudson and Altomore are rendered futile by the Amended Final Judgment which conveyed full title to the plaintiffs by the payment

of $400. plus interest, and specifically stripped Harvey of all title or interest in these properties. This is the legal effect of the imposition of the constructive trust.

3. The mortgage claim of Solomon will fail for two reasons: first, as an assignee, her claim can be no better than Harvey's, the original assignor. See, *Davenport* v. *O'Connell,* 117 N.J. Eq. 438 (Ch. 1935); *Koppel* v. *Olaf Realty Corp.,* 62 N.J. Super. 103 (App. Div. 1960). Secondly, she took her assignment two years after Harvey's rights as a mortgagee had been adjudicated. In connection with this assignment, I also find that she was relying upon the advice of Harvey and the fact that she took from Rockland National Bank will not suffice to create an arms length transaction of a stranger which she would have this Court recognize.

4. Accordingly, judgment should be entered against defendants Harvey and Solomon and in favor of all the plaintiffs for the relief requested in the Complaint.

5. All other defenses or claims of the defendants not otherwise discussed herein are found to be without merit.

An order in conformity with the foregoing opinion shall be submitted.

LAWRENCE A. WHIPPLE
United States District Judge

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 72-1480 and 72-1481

THEODORUS BRON *et alii*

v.

HERBERT HARVEY *et als.*

HERBERT HARVEY, jointly with FREDA SOLOMON,
Appellants in No. 72-1480

FREDA SOLOMON, jointly with HERBERT HARVEY,
Appellants in No. 72-1481

(D. C. Civil Action No. 482-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12 (6) April 27, 1973

Before VAN DUSEN, ALDISERT and ROSENN,
Circuit Judges.

JUDGMENT ORDER

Having considered all the contentions of appellants,

It is ORDERED AND ADJUDGED that the district court judgment is affirmed, costs to be taxed against appellants.

BY THE COURT:

(Aldisert)
Circuit Judge

Dated: APR 30 1973

ATTEST:

(Thomas E. Quinn)
Clerk

Certified as a true copy and issued in
lieu of a formal mandate in No. 72-1480
only on June 8, 1973.

THOMAS E. QUINN

Test:

Clerk, United States Court of Appeals
for the Third Circuit

Denial of Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1480

THEODORUS BRON, *et al.*

v.

HERBERT HARVEY, *et al.*

HERBERT HARVEY, jointly with Freda Solomon, Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER AND WEIS, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(Aldisert)
Judge

Dated: May 31, 1973.

Chronology

July 2 1931 Deed to Harry Weintraub conveying inter alia the lands of this petition.

Mar. 15 1933 Death of Harry Weintraub, intestate, leaving next of kin his sisters, Bessie Sachs and Rose King.

1953 Deeds Parkway Gardens, Inc. and Iselin Oaks, Inc. to present respondents.

1953 Mortgages made by respondents to Underwood Title and Mortgage Co., each for nearly the full amount of purchase price and duly recorded.

Aug. 10 1956 Blanket mortgage, Hudson Trading Corporation to Herbert Harvey, including after-acquired property in Middlesex County.

Aug. 13 1959 Date of record of mortgage of Aug. 10 1956.

Nov. 28 1959 Date of deed, William King as executor and trustee under the last will and testament of Rose King, deceased, to Hudson Trading Corporation.

Dec. 14 1959 Date of deed, Bessie Sachs and husband to Hudson Trading Corporation.

Dec. 21 1959 Date of record of two last-mentioned deeds.

Dec. 28 1960 Complaint filed, Hudson Trading Corporation and Frank Altomare vs. Saulnier et als, docket # L 6513-60.

Feb. 14 1961 Counterclaim filed in above-mentioned action by Saulnier et als to quiet title.

June 11 1962	Decision of Superior Court in above-mentioned action in favor of Hudson and Altomare.
July 7 1962	Date of mortgage,* Hudson Trading Corporation to Harvey for $22,500. covering inter alia the lands hereof.
Sept. 14 1962	Judgment entered in Superior Court in favor of Hudson and Altomare pursuant to last-mentioned decision.
Dec. 5 1962	Date of record of last-mentioned mortgage.*
Oct. 29 1962	Notice of appeal to Appellate Division of Superior Court of New Jersey by present respondents against Hudson and Altomare.
May 6 1963	Unanimous decision of Appellate Division sustaining trial court.
July 1 1963	Certification by Supreme Court of New Jersey for review of judgment.
Apr. 20 1964	Opinion of Supreme Court of New Jersey reversing trial court.
June 26 1964	Amended Final Judgment of trial court divesting Hudson, Altomare and Harvey in favor of present respondents.
June 1 1965	Application of Hudson and Altomare to Supreme Court of New Jersey to review amended final judgment denied.

* This mortgage was assigned by Herbert Harvey to Rockland National Bank Dec. 28, 1962, recorded January 8, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-372

HERBERT HARVEY,
Petitioner,

vs.

EMILE W. SAULNIER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

ROBERT N. WILENTZ,
Counsel of Record for Respondents,
(Member of the Bar of the United States Supreme Court),
252 Madison Avenue,
Perth Amboy, New Jersey.

WILENTZ, GOLDMAN & SPITZER,
252 Madison Avenue,
Perth Amboy, New Jersey.

ALAN M. DARNELL,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

HERBERT HARVEY,

Petitioner,

vs.

EMILE W. SAULNIER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

Statement of the Case

The facts leading up to the Judgment rendered by the United States Court of Appeals for the Third Circuit (Petitioner's Appendix, p. 30a) are set forth in *Bron* v. *Weintraub,* 42 N. J. 876 (1964), (Petitioner's Appendix, p. 1a-11a) together with the opinion of the District Court denying Petitioner's motion for summary judgment (Harvey Appendix, p. 21a-24a) and the opinion of the

District Court granting quiet title to Respondents (Petitioner's Appendix, p. 25a-29a).

Respondents disagree with the basic premise of Petitioner's contention that he was denied due process by the Courts of the State of New Jersey and by the Federal Courts. On the contrary, the facts expressed in the abovementioned opinions demonstrate beyond a doubt that Petitioner was accorded the fullest due process of law in both the State and Federal Courts. To say that Petitioner had his day in court would be a gross understatement—that he has had a great many days in court would be closer to the reality. Petitioner has used these innumerable days in court to harass the Respondents by prolonging the uncertainty in respect of the titles to their respective homes and by subjecting them to such multiplicity of litigation which might, except for the special circumstances of this case, have subjected them to a near-bankrupting spate of litigation fees and expenses or compelled them to settle and pay the Petitioner his money demands to avoid said fees and expenses.

Preliminary Statement

The necessity for Respondents to reply to Mr. Herbert Harvey's petition for a Writ of Certiorari represents still another sad chapter in Harvey's continuing harassment of the Respondents and his continuing efforts to avoid the consequences of the New Jersey Supreme Court's decision in *Bron* v. *Weintraub,* 42 N. J. 87 (1964), judgment upon remand affirmed, 45 N. J. 1 (1965). It is outrageous that these Respondents are still insecure in their respective titles to their homes, eight years after the Courts of New Jersey decided that Harvey and his associates have no estate, interest or right in, or lien or

encumbrance upon the lands and premises of the Respondents. *Bron* v. *Weintraub*, judgment upon remand, affirmed 45 N. J. 1 (1965). This honorable Court declined to review the decision. *Harvey* v. *Lyons, et als.*, cert. denied, 382 U. S. 918 (1965), pet. for rehearing denied, 382 U. S. 1003 (1965).

Since the above decisions, Harvey has attempted to circumvent their effect by taking advantage of technicalities and appearing in court in various guises. In the instant case, he appears as an alleged mortgagee of Hudson Trading Corp. attempting to reassert interests in Respondents' properties which were long ago declared to be null and void. Because the United States Court of Appeals for the Third Circuit affirmed the decision of the Federal District Court, penetrating Harvey's transparent attempt to avoid the consequences of *Bron* v. *Weintraub, supra,* Harvey has instituted the present petition for a writ of certiorari. Unfortunately, the Respondents herein, who should have been free of Herbert Harvey's machinations years ago, continue to suffer because of his exploitation of the judicial process and his arbitrary refusal to accept the prior binding decisions of the State and Federal Courts.

In its original opinion, *Bron* v. *Weintraub, supra,* the Supreme Court of New Jersey declared that "Hudson and Altomare, having acquired the outstanding title under 'circumstances which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same'." 42 N. J. at page 96. The Court ordered that the householders (Respondents herein) were equitably entitled to the property upon reimbursement of the monies paid to the Weintraub heirs with interest.

The Supreme Court of New Jersey did not base its decision solely on the equities involved, but rather based its decision on public policy which, the Court stated, was to support tax titles—"a policy which overall is burdened by the conduct before us." 42 N. J. at page 95. The Court was not challenging the right of existing interests to convey to third persons, but rather condemned the intrusion upon the scene of third persons who sought only to further their own interests, rather than the interests already on hand. Referring to the damage resulting from such intrusions, the Court stated:

> "The burden upon individuals situated as are the householders in this case is evident enough. These manifest hurts should not be tolerated unless it can be said that some other legitimate interest or advantage is served. We find none. We see no social value or contribution in the activities of Hudson. On the contrary, decent men must sense only revulsion in this traffic in the misfortunes of others." 42 N. J. at 95.

Were this Court to grant certiorari and hold that Harvey has a valid mortgage lien upon the property owned by Respondents, it is submitted that the public policy supporting tax titles would be thwarted and individuals such as Harvey would be encouraged to continue their title-raiding activities which skirt the borderline of legality and offend the morality of decent men. Rather, certiorari should be denied, so that these innocent householders will finally have the peace and comfort of knowing that the titles to their homes are secure and to demonstrate that these title-raiders cannot use the law to further their nefarious purposes, no matter how ingenious their schemes may be.

Statement of Reasons in Opposition to Petition for a Writ of Certiorari

1. There are no constitutional rights involved warranting the granting of a petition for a writ of certiorari.
2. The law favors an end to litigation and a denial of the petition will serve to end the harassment of Respondent by Petitioner.

POINT I

There are no constitutional rights involved warranting the granting of a petition for a writ of certiorari.

The "constitutional question" propounded by the Petitioner consists of an assertion that Petitioner was denied due process of law in both the State and Federal Courts. Petitioner bases this assertion on his claim that the Supreme Court of New Jersey denied him due process. Respondents respectfully suggest that, assuming *arguendo* that such a denial occurred, it took place over eight years ago—and Petitioner's time to petition for a writ of certiorari has long since expired. In spite of this, Harvey has simply refused to accept the authority of this decision, and has come back to both the State and Federal Courts many times during the past eight years—each time claiming that the decision in favor of the householders constituted persecution of him and his title-raiding activities. Each court in turn has stripped Harvey of his cloak of martyrdom and has labeled him the persecutor (rather than the persecuted) of both the householders and the Courts.

Throughout his petition, Harvey seeks to divorce himself from the activities of his corporate alter ego and

would have the Court believe that he was not in control of the litigation which has preceded this petition. The facts support the conclusion that Harvey was a party in a real sense to the proceedings and, accordingly, is bound by the Amended Final Judgment specifically divesting him of all interest in the properties owned by the Respondents. If Harvey had any quarrel with the Amended Final Judgment, he could have petitioned this Court for relief eight years ago. However, even though Harvey *himself* petitioned this Court in *Harvey* v. *Lyons,* 382 U. S. 918 (1965), he did not raise the issue of "divestment of property without due process."

Although Harvey has tried to hide the equities of this matter behind an avalanche of obscure legal cavil, there is no doubt of the eminent fairness of the decisions of both the State and Federal Courts. The denial of certification in *Harvey* v. *Lyons,* 382 U. S. 918 (1965), settled once and for all the judgment that Hudson, Altomare and Harvey never held title to the properties of the Respondents; rather, Hudson and Altomare held title in constructive trust for the Respondents herein and Harvey had no interest at all. Since Harvey appears before this Court solely as an alleged mortgagee under a mortgage on after-acquired property given to him by Hudson, he has no interest in the properties of the Respondents, for, as stated above, it has been decided that Hudson never "acquired" title to these properties. As stated by Judge Whipple in his opinion, "This is the legal effect of the imposition of the constructive trust" (Petitioner's Appendix, p. 29a). Moreover, it needs no citation that a mortgagee acquires no better title than his mortgagor in whose shoes he stands. And it has been specifically held that a mortgage on after-acquired property attaches only to such interest as the mortgagor acquires. In re *New York,*

S. & W. R. Co., 109 F. 2d 988 (3rd Circuit, 1940), cert. denied, *New York Trust Co.* v. *New York, S. & W. R. Co.*, 310 U. S. 633, *Knickerbocker Trust Co.* v. *Carteret Steel Co.*, 79 N. J. Eq. 501 (Ch. 1912).

Thus, whether or not the Amended Final Judgment specifically divested Harvey, he lost all of his interest as mortgagee of Respondents' properties (which is the only interest he asserts before this Court) by virtue of the decision that Hudson never acquired any title in its own right but rather held the interest of the Weintraub heirs as a constructive trustee for the Respondents.

POINT II

The law favors an end to litigation and a denial of the Petition will serve to end the harassment of Respondents by Petitioner.

Counsel for Respondents believes that no useful purpose would be served by a detailed rehashing of the facts and the law of the instant case or by a meticulous attention to any discrepancies in the Petitioner's brief or a rebuttal of the technicalities raised by the Petitioner. The trials and tribulations of the ten householder couples may best be viewed as a sea journey.

The ten householders set sail upon a journey across the judicial seas some 13 years ago in search of a solution to the title problem which had beset their homes. Soon after the journey began, there appeared upon the horizon a marauding vessel captained by Herbert Harvey, the title-raider, as the New Jersey Supreme Court termed him. He attacked the titles of the householders and has persisted in these attacks to date. Every time it ap-

peared that the householders had reached safe harbor and found a solution to their problem either by virtue of an opinion of the New Jersey Supreme Court or a denial of a writ of certiorari by the United States Supreme Court or other decisions of the Federal Courts, this title-raider has taken up the attack from another vantage point and has driven the householders back onto the storm-tossed open seas.

Now it appears that this title-raider has permitted seven of the ten householders to disembark safely ashore (hopefully secure from any further harassment resulting from his nefarious dealings). Whatever distinctions he may seek to make before this Court between the aforementioned seven householders and the remaining three householders, can only be without a difference since they were all in the same boat and their causes are equally meritorious. Further, the times for him to appeal from the various prior decisions which have cut off his interest in the householders' properties, as a mortgagee or otherwise, have long since expired but the travail of the remaining householders is not yet at an end.

Accordingly, counsel respectfully requests that this honorable court deny the petition for a writ of certiorari so as to finally defeat this marauder of the judicial seven seas and permit the remaining householders to find a safe haven secure in their homes, the titles to which have been made safe from further attacks by the Petitioner.

CONCLUSION

It is respectfully urged that for the reasons set forth, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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ALAN M. DARNELL,
On the Brief.

SUPREME COURT, U. S.

FILED

OCT 29 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-372

HERBERT HARVEY,

Petitioner,

—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER.

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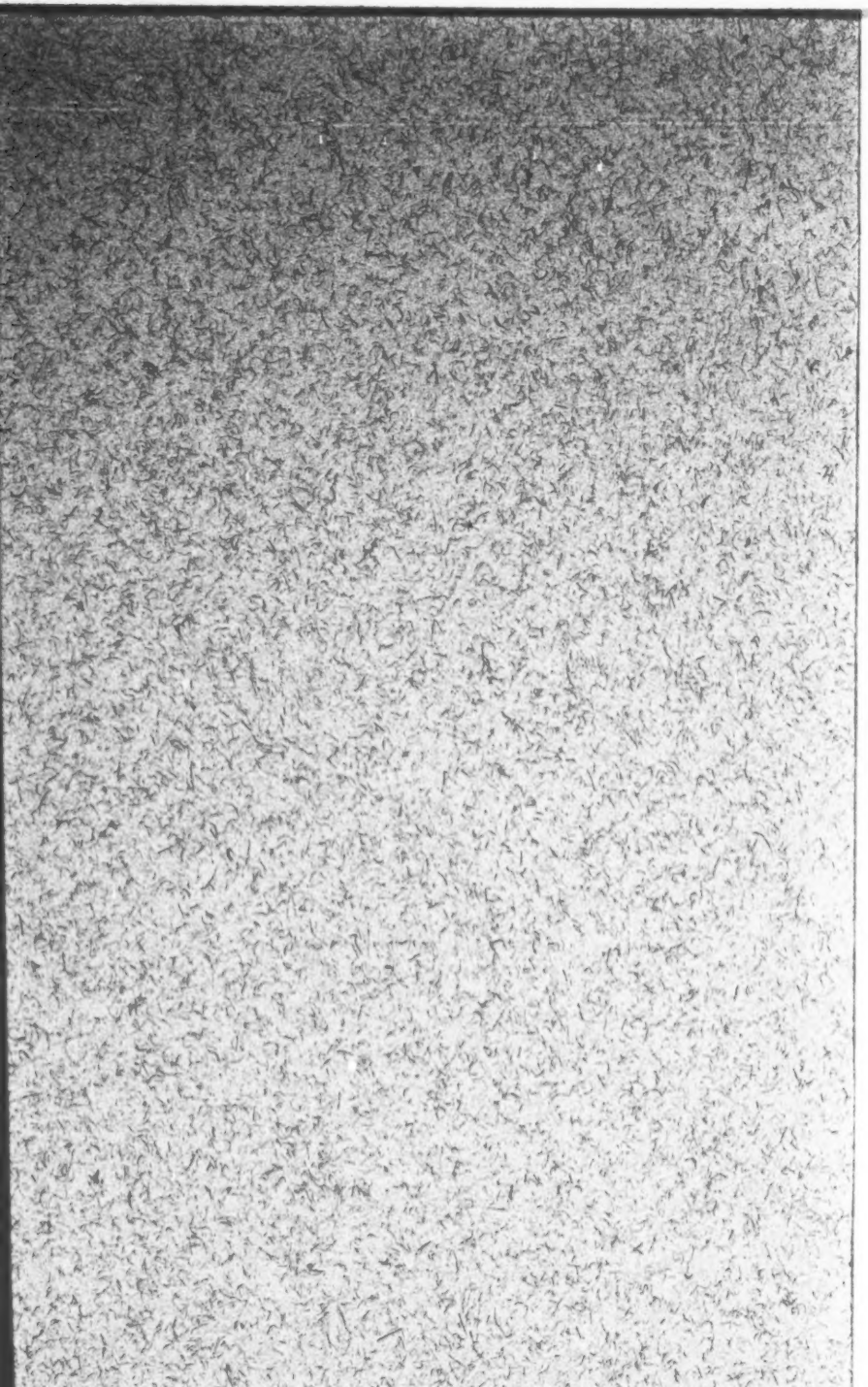

REPLY BRIEF OF PETITIONER

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Rule Cited

Rules of the Supreme Court of the United States — Rule 40 (5)

VERACITY

The Rules of Practice require that pleadings for clients be presented by attorneys admitted to practice before this court. Being officers of the court, these practitioners may be presumed to limit the representations in their briefs to what the record contains.

I am not an officer of the court, and appear pro se. In writing my Petition I was mindful of this. I continually cited the record for the facts employed in the argument. Counsel for respondents, however, relies for the facts in his brief on his credibility. This should indeed be sufficient. But it becomes painfully necessary to point out that his facts, for the most part, and substantially, are not supported by the record. Frequently they are in conflict with it.

There follow a number of quotations from Brief in Opposition filed for respondents. The quotations embrace the bulk of the factual representations of that Brief. Each is examined with reference to the record. This examination will serve to evaluate the factual basis of the Brief.

> . . . Harvey's petition . . . represents continuing harassment of the respondents . . . It is outrageous that . . . these respondents are still insecure in their respective titles to their homes, eight years after the courts of New Jersey decided that Harvey [has] no encumbrance.
>
> Since the [state court] decisions, Harvey has attempted to circumvent their effect by taking advantage of technicalities and appearing in court in various guises . . . Respondents herein continue to suffer because of his exploitation of the judicial process. Brief in Opposition - Preliminary Statement page 2.

It was respondents who waited eight years to bring the present proceeding. It was brought presumably because the state decision (not decisions) was patently void. I have not appeared in court in various guises, but only in my own name. The question raised by me in this proceeding is of the essence of due process of law. It is not a technicality. If respondents suffer title difficulties, those difficulties were not procured by me, but preceded my involvement. Petition, page 4. The Record, Exhibit DH-11 page 57a. Transcript, page 17.

> The Supreme Court of New Jersey did not base its decision solely on the equities involved, but rather based its decision on public policy which, the Court states, was to support tax titles - "a

policy which overall is burdened by the conduct before us." 42 N J at page 95. Brief in Opposition - Preliminary Statement page 4.

There was no tax title to the properties of respondents. It is probable that the state court would not have made the mistake of saying there was if I had been before it in the matter from which the foregoing quotation is taken. No evidence was introduced in district court of any tax title affecting the lands in question. Transcript, passim. Some evidence was introduced to the contrary.*

> Were this court to grant certiorari . . . individuals such as Harvey would be encouraged to continue their title-raiding activities which skirt the borderline of legality and offend the morality of decent men . . . Rather, certiorari should be denied . . . to demonstrate that these title-raiders cannot use the law to further their nefarious purposes, no matter how ingenious their schemes may be. Brief in Opposition - Preliminary Statement page 4.

*A tax proceeding affecting one of the properties of Bron vs. Weintraub, but none of those here involved, was pending at the time of the Hudson acquisition. Trial Exhibit DH-7 describes the property there involved. Even that claim was expunged, and the proceeding terminated, by final judgment, not appealed, (Trial Exhibits DH-9, DH-10) on December 8, 1960, being prior to the institution of the state court proceeding, Hudson vs. Saulnier, which concerned respondents. For description of the respondents' properties, see Appendix to Petition, pages 13a and following.

This language is both gratuitous and scurrilous. There is no evidence in the record to warrant it.

> Petitioner bases [the constitutional question] on his claim that the Supreme Court of New Jersey denied him due process. Brief in Opposition - Point I page 5.

I never appeared before the Supreme Court of New Jersey in this matter. The basis of my Petition is that I was denied due process in federal courts. Petition, page 3; page 20; page 24.

> Harvey has come back to both the state and federal courts many times during the past eight years . . . Each court in turn has stripped Harvey of his cloak of martyrdom and labeled him the persecutor of both the householders and the courts. Brief in Opposition - Point I page 5.

One court has labeled me in these terms - the U.S. District Court for the District of New Jersey. It did so with no warrant in the record before it. Petition, page 16. No other court heard me.

> Harvey seeks to divorce himself from the activities of his corporate alter ego and would have the court believe that he was not in control of the litigation which has preceded this petition. The facts support the conclusion that Harvey was a party in a real sense to the proceedings. Brief in Opposition - Point I page 5.

There are no facts in our record to support such a conclusion.*

> Whatever distinctions [petitioner] may seek to make before this Court between the . . . seven householders and the remaining three householders [respondents here] can only be without a difference since they were all in the same boat and their causes are equally meritorious. Brief in Opposition - Point II page 8.

This is untrue. Petition, page 5, first footnote. In any case, counsel omits to mention what the merits of the seven are which are applicable to his clients.

The foregoing examples, which are not exhaustive, show that the facts employed by counsel in his Brief in Opposition are not derived from the record but are supplied by counsel. Perhaps the intent is to discredit Petitioner.**

*nor does the record disclose a corporate alter ego of Harvey. The Record. Transcript, passim.

**Concerning statements and allegations of fact not derived from the record, I have not discussed here the countervailing facts in each instance. It is not conceived that this court is sitting as trier of fact. I write this reply Brief on the theory that allegations not supported by the record, as well as arguments based upon them, will simply be discarded.

ARGUMENT

His reasons are as two grains of wheat
hid in two bushels of chaff . . .
- The Merchant of Venice

In the rash of abuse which comprises plaintiffs' Brief, there may be discovered two arguments.

One (page 6) says that, since I am the holder of an after-acquired mortgage, I can claim the title only in the condition in which it was acquired by my mortgagor, that is, subject to the trust.

A similar argument from the Opinion of the District Court is discussed in the Petition (page 15, ii; page 20, vii). Apart from the circumstance that no trust had been imposed until some years after the mortgages vested, I was not a party to the proceedings in state court in which the trust was imposed. If that trust were to be interpreted retroactively against me, as respondents here suggest it should be, I should have been a party so that I could have presented to the court the facts upon which its determination would turn. The cases cited by respondents do not conflict with this view. The mortgages cannot be disposed

of, on any theory, without giving the mortgagee an opportunity to be heard. Respondents' argument is therefore without merit. There was want of due process in my divestment.

The other argument is embedded in the metaphor (Brief in Opposition - Point II, page 7) in which counsel pictures himself and his clients as being at sea. They set out, 13 years ago, on a voyage through the courts to perfect title. It was argued that, apart from Harvey, this voyage would have been successfully concluded in the harbor of marketable title. A pretty allegory.

What the yarn omits is that, if respondents sought to wipe out my interest, they should have made me a party to their suit. They neglected to do so. When my mortgagor sank their galleys in the state litigation, the (present) respondents appealed. Had they expected to prevail against me, they should have named me in that appeal. They omitted that, too.

A decade later, counsel (who himself conducted that state court appeal) comes swaggering into this court, belatedly picturing his clients as victims of a piratical Harvey. There is no virtue in the conceit and no merit in the argument embedded in it.

Respondents' Point II is indeed no more than its caption - an injunction to put an end to litigation. This, to be sure, can be done by denying review. An end to litigation is always desirable. But it is not the ultimate consideration. If it were, no decision would be reviewed in any circumstances. My Petition urges review on meritorious and what I believe to be compelling grounds.

Respondents' Brief in Opposition does not actually engage the proposition of the Petition. The argument of the Petition is that a determination of a state court, in a matter in which I was not before it, has been employed here in federal court, where it was inadmissible, to divest me; and that this is not due process of law.

Respondents' position in their Brief in Opposition, so far as it can be disentangled from vituperation, seems to be that my argument must be rejected because of what the state courts said in that matter in which I was not before them. But this is an absurdity. What the state courts said cannot be used to determine whether what they said is or is not admissible in a later proceeding.

SCANDAL

The main thrust of respondents' Brief to this court is - it appears on page after page - that petitioner Harvey is a scoundrel.

No evidence is cited, or is found in the record, in support of this proposition. It is slander.

The rules of this court prescribe that briefs shall be free of scandalous matter. Respondents' Brief notably fails to conform.

The Rule in question, Rule 40 (5), persuades me that the court will not adhere to a jurisprudence in which that party who calls his adversary the worst names will thereby prevail. Respondents' Brief in Opposition may well be disregarded by the court.

SUPREME COURT, U. S.

FILED

DEC 6 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-372

HERBERT HARVEY,

Petitioner,

—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING, AND MOTION.

HERBERT HARVEY, *pro se,*
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PETITION FOR REHEARING

Consideration by a Justice Warranted

Because of the summary way in which the petition for certiorari in this matter, addressed to the Supreme Court of the United States was denied, one has the impression that it was disposed of in a preliminary filtering process according to its category alone - it was a case involving an estate in real property held by an individual - and did not reach a stage of consideration by the justices of the court, on the merits or otherwise.

Further because of the extreme nature of the violation of due process in the proceedings below it is urged here that the petition to your court be examined by one or more justices to measure the degree.

Everybody and his brother are heard screaming about due process in the courts. But here we are dealing with a most fundamental question. Has the whole substance of due process been abandoned in certain sectors of judicial practice in the United States? This question is presented in my petition. It is not a question to be thrown out by a preliminary screening process - a matter of classification only. It may fall into a particular category, but should receive consideration based on the extraordinary deprivation of due process of law which it presents.

A Motion is annexed to this petition for re-

hearing, requesting that the Chief Justice examine the petition and determine the degree to which review is warranted, being the degree to which due process has been extirpated from this (not untypical) proceeding below your court in a matter affecting, to be sure, only an individual's interest in real property, but dealing with that interest in a way peculiarly repugnant to legal, equitable, just and decent practices.*

The Role of the Courts

One recognizes that the denial of a petition for certiorari to this court does not imply that the court embraces the principles which it thereby declines to review. The court in this way is, in a sense, forced into an unwilling alliance with much that it does not approve. However, in this matter, the alliance is with a grave evil. The principle implicit (and, indeed, rather explicit - see Petition, page

*To cite one specific - this matter was determined below on the proposition that I am a scoundrel. This was largely if not wholly the basis. It may, for all your court knows, be true. But no item of evidence was introduced into the court below, nor into any other court where I was present, to support the proposition. My contention in the Petition is that, scoundrel or no, I am entitled to be heard, somewhere, on this proposition. I never have been.

The point emerged with particular clarity from the recent violent disturbances in the District of Columbia prison, where one issue was the systematic corruption of teen-age prisoners by prison life. It was the inmates of the prison, and not its administrators, who could not stomach the abuse. To observe that most of those arguing against the abuse were criminals does not detract from the cogency of the argument. It merely accents it.

So here. Were I the world's greatest scoundrel, the circumstance would be irrelevant to the argument presented in my petition. It would, however, shed some light on the character of certain exemplars of law.

14) in the determination below is that both state and federal judges may dispose of people's real property as they choose, and in response to any impulse of their own unrelated to legal or equitable considerations, without let or hindrance, and more especially with complete immunity to review by the highest court in the land. This prerogative is being exercised. It has been exercised in the present instance. Your court will not wish, even involuntarily, thus to be embraced by the chicane of lower courts.

A large segment of disrespect for law in our country, which is to say within the jurisdiction of the present court, is rooted in a conviction, based on impartial observation, that the courts cannot be depended upon to render judgment in accordance with the principles of law and equity but that rather, in cases where an interest of the judge, or of those to whom he is beholden, are in question, the interests and not the law or the equities will prove determinative. In simple words, if the court cannot be trusted, the law cannot be respected. People of enterprise will often, and not unnaturally, greet this situation with the response of taking the law in their own hands.

In short, if courts will not respect the law who will? And equity lies in the same bed.

Your court is building construction designed to uphold law. It is useless to do this with one hand while encouraging the breakdown of law by refusing with the other to deal with lawlessness in the courts.

These observations are designed to meet my obligation to demonstrate to the court that my petition should be heard.

Honor

There is one other aspect to the same question. Attorneys admitted to practice before your court are not merely anybody, but an elite. They are selected by the court. How does counsel for my adversaries shine?

A reading of my Reply Brief in this matter will suggest to an impartial observer that the Brief in Opposition to the petition, submitted by counsel, is mendacious - that it is, in the vernacular, a pack of lies. What does this tell us of the elite which comprise the officers of your court? Are they selected for their adroitness in falsification? Caesar's wife should be above suspicion. In the instant matter, counsel wandered far from the truth, and he prevailed. Is it to be said that the party which tells the biggest lies will be the prevailing party in the Supreme Court? A question, perhaps, of appearance, but a significant one.

Certification; Summary of Grounds.*

This request for rehearing on my Petition is made in good faith and not for purposes of delay.

*Within the permitted time of 25 days under the Rule - considering delays in the mail, by which the court's prior determination was transmitted to me, the current state of the printing industry, not to mention the existence of rackets thriving on the processes of justice which operate up to the very doors of the Supreme Court, the etiology of which is suggested in my text - it is physically impossible to do more than dash off the basics of the present argument. Defects in presentation may be attributed to time compression.

Its grounds are that, notwithstanding the category - one for exclusion - into which the case falls, the court's attention is warranted by the extraordinary loss of validity in the judicial process which it manifests both in a disregard below of the most primitive and fundamental of the elements of due process, and in a demeaning of the dignity of the court at the hands of its officers.

MOTION

On the ground that the matter here before the court involves a grave issue of the application of due process in the courts, apposite to the concerns of the Chief Justice in his function of administration of justice through the Supreme Court of the United States, this Motion prays the Chief Justice to examine the petition submitted by me in the matter, denied, to determine whether the question there submitted for review warrants consideration by the court. Petition for rehearing, annexed, argues the need.

Herbert Harvey
appearing pro se